

REPUBLIC OF KENYA

THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1385 OF 2012

ELIZABETH MBURU.....CLAIMANT/RESPONDENT

VERSUS

KENYA BREWERIES LIMITED.....RESPONDENT/OBJECTOR

1. What is presently before me for determination is the Respondent/Objector's Preliminary Objection contained in the Preliminary Objection dated 6th May 2010. The Preliminary Objection was at first raised in the Replying Affidavit of Sheila Ngari and the Supplementary Affidavit of Col. Esther Wambui Njombo. Mr. Burugu for the Respondent/Objector raised the Preliminary Objection which was responded to by Mrs. Ligunya for the Claimant/Respondent. Mr. Burugu submitted that the suit does not reveal any breach of the Constitution in force at the time. It was not filed as a suit under the Trade Disputes Act or the Employment Act cap 226. He stated that the filing as an Originating Summons was to defeat the Limitation of Actions Act. He relied on the case of **Abraham Kaisha Kanzika t/a Kapco Machinery Services & Milano Investments v. Governor Central Bank & 2 Others [2006] eKLR** for the proposition that the so called constitutional rights are mere private contractual rights and no one should be allowed to bypass the provisions of statute to defeat the limitations. He also referred to the case of **Petronella Nellie Chirwa v. Transnet Ltd (2007) ZACC 23** where the Constitutional Court in South Africa held that a matter does not become a constitutional matter merely because the party calls it one. He urged the Court to be persuaded by that decision not to elevate a labour issue to a constitutional issue. He submitted that the suit is statute barred and bad in law. He submitted that the Petitioner was dismissed from her employment in April 1994. The Originating Summons were filed in 2004 well over 9 years from the date the Petitioner was dismissed. The reason why the case was filed as a Petition was to defeat the time bar. He submitted that even if there was no limitation period set there was laches or undue delay. He relied on the series of judicial authorities filed by the Respondent/Objector but singled out for special mention the cases of **Leonard Mutua v. Attorney General & Another [2014] eKLR** and **East African Portland Cement v. Attorney General & Another [2013] eKLR**. He urged the Court to prevent legal anarchy and uphold the finding that it is wrong to constitutionalise everything.
2. Mrs. Ligunya was opposed and submitted that on the basis of **Mukisa Biscuits v. West End Distributors [1969] EA 696** what qualifies as a Preliminary Objection is a point of law which has been pleaded or arises out of clear implication out of pleadings and if argued as a Preliminary Objection may dispose of the suit. She stated that the Preliminary Objection should raise a pure point of law and the assumption is that all the facts pleaded by the other side are correct. She submitted that the Court had been referred to the Originating Summons which raises issues touching on the Respondent/Objector's actions as employer of the Claimant/Respondent. It was her submission that the actions of the Respondent/Objector in terminating the employment brought out a constitutional issue. She submitted it was not the termination *per se* but the process. The employee was suspended for a period of 4 months without communication or pay and that issue must be ascertained and this can only be ascertained after the Court hears the parties. On that issue a Preliminary Objection cannot stand if what is sought is judicial discretion. She submitted that from the pleadings filed issues have been raised aside from the employee-employer contract and this Court has unfettered discretion to determine the issue. She submitted that on the strength

of Article 165 the Court has jurisdiction to hear and determine the breach of rights under the bill of rights. The Court has jurisdiction as a High Court to determine issues of fundamental rights of employees in the relationship between the employer and employee to ascertain if there has been infringement. Reliance was also placed on Articles 23, 50 of the Constitution and the oxygen principle. She cited the case of **Dominic Arony Amolo v. Attorney General Misc. Application 494 of 2003** where Hayanga J. held that every law must accord with the Constitution otherwise it will suffer the defect of invalidity. She submitted that the Claimant filed the case in the constitutional Court and the Court cannot disregard the constitutional rights she seeks to enforce. Hayanga J. held that no statute should by implication bar proceedings. She closed by submitting that a claim based on fundamental rights requires special consideration and this Court should ascertain the issues raised in the Memorandum and what is raised as a Preliminary Objection should not stand as it is not a pure point of law.

3. In his reprise, Mr. Burugu submitted that he was in total agreement with the case of **Mukisa Biscuits** above that Preliminary Objection should only arise from pleadings. He stated that from what he had submitted he had not gone beyond his pleadings to raise the Preliminary Objection. The Constitution referred to by the Claimant/Respondent is the 2010 Constitution not the repealed Constitution which applies to this case. The oxygen principle should apply to the Respondent who seeks to apply justice.
4. I reserved my Ruling on the matter to consider the issues and legal conundrum raised. I have considered all the pleadings, submissions of parties and the authorities cited in coming to this decision. If I do not advert to a particular authority it is not because it has not been considered. The suit was filed as an Originating Summons on 12th March 2004 before the High Court. The case was assigned the Cause No. 239 of 2004 (OS). It was expressed to be under rules 10(a) and (b) Constitution of Kenya (Fundamental Rights & Freedoms of the Individual) Rules 2001, Sections 60, 70, 71, 72 & 73 of the Constitution of Kenya, the inherent jurisdiction and enabling provisions of the law. In it, the Claimant sought the determination of 8 questions relating to the breaches alleged of the Applicant's fundamental rights to due protection of the law, inhuman and degrading treatment and right to livelihood *inter alia*. The Respondent now raises an objection to what is perceived as the articulation of a labour dispute or rather the elevation of a labour dispute to the constitutional platform. The Respondent asserts that the Claimant's cause of action had been extinguished by time hence the initiation of a labour dispute through the backdoor using the allegations of abridgment of the Claimant's constitutional rights as a cover. The infringement of the Constitution whether the repealed one or the Constitution of Kenya is an affront the Court cannot not countenance. Were the issues raised by the Claimant capable of being seen through the prism of abridgement of constitutional rights or were these what would fall in the category of unfair labour practices? Was there inhuman or cruel treatment meted out to the Claimant or were there institutional failures to accord the Claimant a fair chance at a hearing before the dismissal?
5. Not all issues in the employment dispute are constitutional issues. There is a real danger of abusing the Constitution if all interactions and subsequent disputes are considered constitutional issues or matters requiring interpretation of the Constitution or requiring the enforcement or protection of fundamental rights under the Bill of Rights. It would be absurd to have each and every dispute elevated to the constitutional platform. It is apparent that the suit is one which relates to the pursuit of remedies in the nature of employee-employer disputes under this Court's jurisdiction both in its former sense and presently as constituted. Under the regime of laws applicable in 2004 when the suit was filed it was under the regime of the Employment Act cap 226 laws of Kenya. Under that regime of law, the limitation was expressly provided for in the statute and recourse is to the Limitation of Actions Act Section 4(1) which sets the time bar at 6 years for any acts under contract. Using the date the cause of action accrued in April 1994 the limitation would set in in the year 2000. The suit was filed 4 years out of time. The suit therefore is out of time and thus not one upon which a cause of action for redress on employment issues can be founded. The Claimant sought a clever way to put forward her case which was now time barred by appealing to the Court's constitutional jurisdiction.

6. The attempt by the Claimant to elevate the contest to the constitutional platform is misplaced. It is clear from the Originating Summons filed the dispute is in the main on employment and this can be gleaned from the questions the Claimant sets out for determination in the Originating Summons. I am persuaded that on the basis of **Petronella Nellie Chirwa v. Transnet Ltd (2007) ZACC 23** where the Constitutional Court in South Africa held that a matter does not become a constitutional matter merely because the party calls it one. In the premises I would uphold the preliminary objection raised by Mr. Burugu. The suit is without any legs once we cut off the constitutional pins the Claimant has attempted to deploy to hold this case together. It is dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of June 2014

Nzioki wa Makau

JUDGE